

The Duty to Accommodate Disabled Employees

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Résumé de l'article

Certaines pratiques managériales, même celles qui sont imposées sans préjudice à l'ensemble des employés, peuvent avoir un effet particulier sur la santé et le rendement de quelques employés handicapés. De récentes décisions judiciaires et arbitrales touchant la discrimination pourraient entraîner une limitation des droits de la direction.

Cet article est divisé en deux sections. D'abord, un ensemble de questions juridiques particulièrement épineuses sont décrites en autant qu'elles touchent les travailleurs handicapés. La seconde section fait l'application de ces problèmes à l'expérience spécifique des travailleurs diabétiques qui travaillent sur des quarts. Cette application pratique permet de fournir un exemple de discrimination et de démontrer l'impact des décisions en matière de droits de la personne.

L'obligation de l'employeur d'accommoder les employés handicapés aura un impact majeur sur les pratiques de gestion. Autant les employeurs que les syndicats auront avantage à prendre la direction suggérée par la Cour suprême du Canada dans sa décision importante dans l'affaire *Central Alberta Dairy Pool* (1990). Afin de présenter une défense de bonne foi sur les qualifications occupationnelles, à rencontre d'une accusation de discrimination, l'employeur doit d'abord satisfaire à l'obligation d'accommoder. La décision *Binder* a ainsi été renversée.

Afin de montrer les complexités pratiques et légales qu'impliquent les cas touchant les handicapés, quatre problèmes ont été retenus : d'abord, comment les arbitres ont-ils fait la différence entre le handicap d'un employé donné et les caractéristiques communes de cette maladie? On tend à s'éloigner de l'évaluation basée sur les caractéristiques communes. L'employeur doit présenter sa preuve en regard de la performance spécifique d'un employé handicapé donné et ne peut pas refuser de l'accommoder en se référant aux normes communes applicables à la maladie dont celui-ci est affligé.

En second lieu, qui a le fardeau de prouver qu'un handicapé peut ou ne peut pas nuire au rendement? D'abord, l'employé est responsable d'informer son employeur des problèmes qu'il connaît suite à une maladie et il doit également demander une accommodation. Sans aucun doute, les employés handicapés accroissent leur probabilité de justifier l'accommodation s'ils présentent une position convaincante à l'employeur. Après que cette demande aura été faite, le fardeau de preuve incombe à l'employeur qui doit accommoder l'employé ou refuser sa demande.

Troisièmement, dans quelle mesure l'application des principes applicables aux droits de la personne dans les arbitrages change-t-elle l'admissibilité d'une preuve montée après le congédiement? Les arbitres semblent divisés sur ce sujet. Il est essentiel ici de consulter la convention collective applicable au milieu de travail en question et d'examiner très étroitement les décisions antérieures de l'arbitre concerné. Plusieurs arbitres sont réticents à s'attaquer à des problèmes qui sont en dehors de la juridiction que la convention collective leur accorde explicitement, alors que d'autres vont jusqu'à récrire cette convention collective pour respecter les lois visant l'équité.

Finalement, comment le concept d'accommodation raisonnable va-t-il être intégré à l'intérieur des sentences arbitrales? Les arbitres commencent à utiliser la notion de devoir d'accommodation raisonnable comme étant un critère à être appliqué au rendement futur et non seulement comme une base pour évaluer si l'employeur s'est trompé ou non dans ses pratiques antérieures. Une revue de la jurisprudence démontre que les arbitres sont de plus en plus enclins à imposer un changement dans les termes et les conditions de travail. Une telle position est formulée comme une condition nécessaire pour la réintégration d'un travailleur handicapé qui a été injustement congédié.

La question des droits de la personne et particulièrement le devoir d'accommoder sont des notions difficiles d'application. De façon générale cependant, l'interprétation juridique favorise l'application de mesures de plus en plus rigoureuses en faveur des employés handicapés : la préférence de l'information sur un individu plutôt que sur le groupe, le fait de mesurer le risque spécifique et non le risque hypothétique, et le devoir d'accommodation avant d'en arriver à une défense de bonne foi sur les qualifications occupationnelles. Il devient alors obligatoire pour tous ces acteurs qui établissent des pratiques d'emploi, que ce soit l'employeur, le syndicat ou le gouvernement, de suivre de très près les développements en matière de droits de la personne.

The Duty to Accommodate Disabled Employees

Daphne G. Taras

Drawing on recent legal decisions involving disabled workers, this paper assesses the trends and implications regarding duty to accommodate. In the first section, four specific issues are developed to illustrate the evolution of human rights principles as they are interpreted through tribunals and arbitrations. The second section applies the issues to a specific group of people, diabetic shiftworkers. The focus on diabetic shiftworkers offers a vivid example of adverse effect discrimination, and demonstrates the impact of human rights decisions.

This is a paper about weighing the balance between management rights and employee rights, and management practices and the welfare of disabled workers. Traditionally, hiring, firing, and scheduling hours of work were within the realm of management rights unless constrained by collective agreements or contracts. In the exercise of its rights, management has a duty to act fairly. There is, however, concern that some management practices, even those imposed without prejudice on all employees, might have a disparate effect on the health and performance of some disabled employees. Recent court and arbitral interpretations of adverse effect discrimination are likely to limit management rights.

This paper is organized into two sections. First, some of the thorny issues raised in arbitration and human rights forums are described, as they pertain to disabled workers. Recent decisions regarding duty to accommodate will have a major impact on employment practices, and both management and union would be well advised to heed the direction that is being set by the Supreme Court in such landmark decisions as *Central Alberta Dairy Pool* (1990). The area of human rights is

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continuously evolving, and often practices which were supported by early jurisprudence are later repudiated. Four specific issues of relevance to disabled workers are analysed in this section. Each issue raises subtleties of interpretation and application of human rights principles. While the broad aims of human rights policies are well known, the industrial relations community is still exploring their ramifications on a case by case basis. Once statutes are in place, it is through the richness and variety of case law that further momentum occurs. Together, these four issues and the cases used to illustrate them demonstrate prevailing legal trends.

The second section applies the issues raised in the first section to a specific group of people, diabetic shiftworkers. For diabetic employees, it shall be shown, shiftwork can often be a case par excellence of adverse effect discrimination. By narrowing the focus to a single disease and a single category of employment practices, we can see vividly the impact of human rights on worksite conditions and on individual employees.

THE RIGHTS OF DISABLED WORKERS

Human rights legislation prohibits both overt discrimination and also unintended systemic discrimination arising from employment practices which on their face are neutral in application but have a disparate effect on a protected group of employees, eg. women, visible minorities, disabled, or native people. This section summarizes the prevailing wisdom on the relationship between bona fide occupational qualifications (BFOQ) and the duty to accommodate, and presents four specific points of law that illustrate the balancing act involved in adjudicating adverse effect discrimination allegations of disabled employees. (For a thorough review, see Adell 1991.)

When prima facie evidence of discrimination is established, whether through intent or adverse effect, the employer's only defense is to argue that the discriminatory practice is based on a BFOQ. The employment practice must be imposed honestly and in good faith, and also be directly related to the safe, efficient and reliable performance by an employee of the essential functions of the job (Milkovich et al 1988: 285).

In the past, the relationship between BFOQ and duty to accommodate was rather ambiguous. It was generally believed that discrimination cases should unfold in the following sequence: (1) charge of discrimination; (2) BFOQ defence; and (3) if BFOQ defense withstands scrutiny, there is no duty to accommodate (as in the *Binder* case), while if an employer is unable to prove BFOQ then the issue of accommodating the employee arises (as in *O'Malley v. Simpsons-Sears*).

The current state of thought on disparate effect discrimination is found in the Supreme Court's holding in *Central Alberta Dairy Pool* (1990), regarding management's dismissal of a member of the World Wide Church of God for his inability to work on Easter Monday. Because management made no attempt to accommodate prior to terminating employment, the Court found that the employee had been wrongfully dismissed. Where a neutral rule has an adverse discriminatory effect, some accommodation is required to implement the policy underlying human rights statutes. "[T]he appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship" (p. 491). In order to defend against a charge of discrimination, "The onus is upon the respondent employer to show that it made efforts to accommodate the complainant's religious beliefs up to the point of undue hardship" (p. 491).

Undue hardship is determined on the basis of a set of factors unique to each employer. While there is no hard and fast rule which can be imposed on all employment situations, the courts take into account a checklist of criteria including, but not limited to: financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of workforce and facilities, and posing increased risk to an individual or group. The most rigorous determination of undue hardship in Canada currently is in the Ontario Human Rights Commission's *Guidelines* (1989), which releases employers from the duty to accommodate only if the accommodation "would alter the essential nature or would substantially affect the viability of the enterprise...".

The *Central Alberta Dairy* reasoning overturned the earlier and controversial Supreme Court holding in *Binder*. In the latter case, the Court concluded that wearing a hardhat was an essential work rule, and thus the employer had no duty to accommodate a Sikh employee who, for religious reasons, could not meet the hardhat provision. McIntyre J. ruled in *Binder* that "As framed in the *Canadian Human Rights Act*, the *bona fide* occupational requirement defence when established forecloses any duty to accommodate" (p. 590). BFOQ was defined as job related, not employee related. Similar reasoning to *Binder* led the Court to uphold the discharge of diabetic workers based on blanket provisions of the employers which disallowed insulin-dependent diabetics from undertaking certain jobs, e.g. railway track persons or combat military duties (in *Wayne Mahon v. CPR*, and *Donald Gaetz v. Canadian Armed Forces*, respectively).

In contrast, *Central Alberta Dairy Pool* explicitly imported into the meaning of BFOQ a duty to accommodate (p. 509). Wilson J. argued that in order to meet the spirit of human rights statutes, it was necessary to

consider the relationship between the characteristics of the particular job-holder and the job itself. She said, "The ideal of human rights legislation is that each person be accorded equal treatment as an individual taking into account those attributes" (p. 513).

Though *Central Alberta Dairy Pool* dealt with discrimination on the basis of religion, it is likely to have a profound effect on disabled workers. Any employer of a disabled worker who is having job performance problems arising from the disability, must now attempt some reasonable accommodation in order to satisfy the BFOQ defense. The second and third steps in the sequence described above are reversed: accommodation prior to BFOQ.

To illustrate the practical and legal complexities involved in disability cases, four issues are selected. First, how have arbitrators differentiated between the individual employee's disability and the common characteristics of the disease? Second, which party bears the onus of proof for establishing that a disability does or does not impair job performance? Third, to what extent has the importation of human rights principles into arbitrations changed the admissibility of post discharge evidence? Finally, how is the concept of reasonable accommodation likely to be integrated into arbitration awards?

Actuarial Risk or Individual Assessment?

A severe hypoglycemic episode or a grand mal epileptic seizure - employers have reason to fear these traumatic events, but can they exclude from employment all workers whose medical diagnosis places them within a group which, on average, is disproportionately prone to such events? An analysis of a decade of cases in the 1980s indicates that the courts would usually permit employers to refuse to employ disabled workers only if there is a genuine question of public safety and the "risk of unpredictable human failure" (Skippen 1990: 13; Tarnopolsky and Pentney 1989: 29). In the past two years, however, the courts have been much more inclined to use a cost/benefit approach to assessing risk. The benefit of employing an individual for whom significant barriers to employment exist or have existed in the past can outweigh the safety risk posed by placing that person at a particular job. While in the past adjudicators would admit evidence about the generalized factors associated with the disease, they are now putting substantially greater weight on the individual's medical condition. For example, has this employee's past performance shown any deficiencies due to the disease? Is there any concrete justification for having concerns about future performance?

The *Henderson* case (1989 and upheld by Québec Superior Court in 1990) involved an insulin-dependent but stable diabetic who was excluded from employment in a safety-sensitive position. While management argued that Mr Henderson could not meet its BFOQ for the job, the union's position was that the company erred in treating Mr Henderson as a member of a class rather than considering the merits of his individual circumstances and medical condition. Arbitrator Picher said that

The issue is not whether insulin-dependent diabetics are, as a general matter and viewed from an actuarial standpoint, a higher risk group for the purposes of their employment in safety-sensitive positions. The issue is whether Mr. Robert Henderson, notwithstanding his insulin-dependence, poses such a risk to the company's operations as to justify his termination from employment as a trackman (p. 10).

The arbitrator agreed with the union and reinstated Mr Henderson.

The impact on legal awards of emphasizing an individual's unique medical condition over that expected of a group can be illustrated by contrasting the treatment afforded Mr Mahon in *CPR v. CHRC* (1987) as compared to Mrs Gardner in *Marianhill* (1990). Mahon, an insulin dependent diabetic was terminated by CPR from working as a railway trackman, even though his individual condition was stable. Pratte J. argued that the law did not support "the generous idea that the employers and the public have the duty to accept and assume some risks of damage in order to enable disabled persons to find work" (16,237). By contrast, in *Marianhill* the arbitrator conducted a risk analysis and reinstated a diabetic nursing aid with a proven unstable condition with the accommodation that she work on a fixed night shift. While it was clearly unsafe to allow Mrs Gardner to dispense medication on the day shift, that risk was minimized (but not eliminated) by moving her to the night shift where the dispensing of medication was a less significant duty.

The trend away from class-based assessment of disabilities is quite evident. Arbitrators, human rights tribunals, and courts at various levels have all concluded that any concrete medical information about a grievor's particular condition is much preferred over generalized statements assessing group risk. The employer must prove that the individual's abilities and potentials have been assessed, and that accommodation is "unreasonable" as it relates to the employee's specific condition (Huber, 1989). Sopinka J.'s comments that "an employer may fail to establish a BFOQ defence if he is unable to provide an acceptable explanation as to why it was not possible to deal with employees on a individual basis" (*Central Alberta Dairy Pool*: 526) is a statement which puts management on notice.

This issue might reopen if a challenge is made to Imperial Oil's recently announced (October 1991) Alcohol and Drug Policy. Imperial Oil has decided that employees in safety-sensitive positions will be randomly tested for alcohol and drug use, and that employees in safety-sensitive jobs with "confirmed" substance-abuse problems will be reassigned to alternative employment. The company's reasoning is that "Although the company is committed to rehabilitation, relapse rates are high for people recovering from substance dependency, and there is no way to predict which individuals will experience a relapse or when this will occur" (Imperial, 1991, pp. 2-3). Obviously, Imperial has conducted its own risk-benefit analysis (stimulated in part by the Exxon Valdez disaster), and has concluded that a certain *class* of workers pose too great a danger to be borne by the company. Yet individual workers might receive a sympathetic hearing at court if their history of substance addiction cannot be shown to affect either their current work performance or future use of drugs or alcohol. Imperial expects to be challenged, and such a challenge will certainly establish a clearer judicial interpretation of the relationships among risk, disability, and job performance.

Shifting the Onus of Proof from Employer to Employee

At one time, diabetics, recovering addicts, epileptics, and other disabled employees tended to hide their condition from employers for fear that they would be stigmatized. More recently, for both their legal protection and physical safety, disabled workers are encouraged to notify their employers (Williams 1984: 34; and Kidd 1984; Hirsh 1990: 18). If a disabled employee has a grievance against the employer that involves human rights issues, the "winnability" of the case increases dramatically if the employee had informed the employer of his/her condition and the employer failed to attempt some accommodation.

Is it always realistic to expect an employee to advise an employer of a medical condition? The first signs of many diseases often form a confusing picture of deteriorating health and job performance. How then are we to differentiate between a "poor work attitude" and the onset of a disease? It appears that the test hinges on the awareness of disability known to the grievor (who, if informed, should notify management) and to the employer (who, if the disability is visible cannot defray responsibility for taking note of it).

In *Casey v. General Inc.* (1988) the Supreme Court of Newfoundland determined that the onus was on the employer to take action to place a long-term employee suffering from an obvious stress-

related illness on its disability insurance program rather than taking disciplinary action:

...though his inability to function was obvious to his superiors, and toward the latter stages, to his co-workers, he himself did not realize what was happening to him, or why, and that he was powerless at the time, either to correct his performance or to take any other appropriate action.

In this case, it was unreasonable to expect the employee to inform management.

Where the employee is more fully aware of his/her disease and its impact on job performance, it is unreasonable to expect that the employee *not* inform management. In *Belliveau v. Steel* (1988: on D/5255), the employee was found to be "negligent" in not promptly clarifying his medical status, and this was to have a very significant impact upon the remedies available to him.

In the *Henderson* case, where both employer and employee were well aware of the employee's diabetes, the arbitrator basically found that as a legal matter, the over-all burden of proof rests upon the company, but "as a practical matter it may be incumbent upon the employee" to present evidence to rebut. Unfortunately for Henderson, by not seeking expert medical consultation in order to better inform management of his condition, *even after discharge*, he lost 15 months of backpay, a considerable sum. Explained the arbitrator:

There are reasons ... to limit the amount of compensation owing to Mr. Henderson [since his discharge in September 1987]. It appears that the company was not in receipt of any expert medical opinion concerning Mr. Henderson from a specialist in the treatment of diabetes until it received full medical information and documentation from Dr. Ross in a letter dated December 1, 1988... Mr. Henderson shall therefore be reinstated into his employment forthwith, with compensation for all wages and benefits lost, calculated from December 2, 1988, to the date of his reinstatement... (p. 12).

In *Calco and Calgary Cooperative Association* (1991), Mr Van Dalen grieved his termination for chronic, intermittent tardiness over an extended period of time, and particularly in the year after he was diagnosed with insulin-dependent diabetes. His case rested on the impact working an erratic shift schedule could have on the stabilization of his diabetic condition. While the arbitrator reinstated Mr Van Dalen, he substituted a suspension of five months without pay in part because "The Grievor should have done more to inform senior management people about his condition and the problems he was having" (p. 46). Evidence led at the hearing did, however, establish that the grievor informed management of his condition on numerous occasions, but did so in a less than forceful manner. It became problematic to establish whether the employer could have drawn clear inferences about the relationship

between diabetes and tardiness from the rather oblique discussions of diabetes raised by Mr Van Dalen. Thus, the grievor was partially responsible for failing to present a position to management that was unambiguous.

Further, it is doubtful from the fact situation that Mr Van Dalen approached management with an explicit request for reasonable accommodation. Had he done so, he would have been able to argue that management's failure to accommodate his condition by placing him on a fixed shift schedule meant that management, and not the grievor, was culpable for the grievor's tardiness. The grievance then would have turned on human rights issues: that erratic shift schedules were for him tantamount to adverse effect discrimination. While these human rights issues were led by the union, they were largely ignored by the arbitrator in his award.

Noteworthy in both the Henderson and Calco awards - both situations of mixed or shifting onus - is that the balancing act tends to be reflected more in the backpay portion of the remedy than in the judgement. This "shifting burden of proof" approach finds strong support in *Re Catelli Inc. and Syndicat Int'l des Travailleurs de la Boulangerie* (1988) and *Re Boeing and CAW* (1989).

Importing Human Rights Principles into Arbitration

It has been some 16 years since the Supreme Court of Canada in *McLeod v Egan* held that arbitrators may make authoritative interpretations of statutes. Even more extreme, the arbitrator in *Re Rothmans, Benson & Hedges Inc. and BCT* (1990) believed that he had jurisdiction not only to construe but also to apply human rights statutes, and this reasoning is quickly developing a following among some arbitrators (e.g. Norman, 1991).

A serious tension exists between the underlying principles of arbitration and those of human rights. Grievance arbitrations must assess the decisions and actions of the parties in relation to the collective agreement. Human rights tribunals focus on removing barriers to employment. This tension can be best illustrated in the various streams of cases dealing with the admissibility of post-discharge evidence.

In cases where an employee has been discharged due to "innocent absenteeism" the employer must meet a two-fold test: (1) was the employee's past performance inadequate? and (2) is there any likelihood of satisfactory job performance in the future? With the importation of human rights considerations into arbitration, the establishing of future

performance is a vexing issue. At what time - discharge or date of hearing - does the arbitration board have to consider the prognosis of regular attendance by the employee in the future? In *Re Sonco Steel* (1990) Arbitrator Brown reviewed the jurisprudence on this matter, finding that "There has been a clear division on this issue..." (p. 419).

One group of cases holds that it is unfair to subject management decision-making to continual review, and the employer should not be made to suffer because the employee's condition unexpectedly improved since his/her discharge. A second perspective prefers to use post-discharge evidence merely to explore whether any explanation can be gleaned as to past conduct of the grievor. For example, in *Calco* (1991) it is probably quite important to admit the evidence of Van Dalen's new employer that since Van Dalen has been working on a fixed schedule his performance has been satisfactory. Had the case hinged on human rights arguments, it would have been critical to admit post-discharge evidence that would shed light on the causal relationship (if any) between tardiness and shiftwork. Yet a third view is that it is unfair to disabled employees to ignore the fact that the nonculpable sources of past inadequacies in job performance have dissipated, and that the employee is much more likely to perform adequately in the future. Clearly, the best time to assess the prospects of an employee is on the day of the hearing, not a year earlier when the decision leading to a grievance was made. For example, a labile diabetic's condition might have become stabilized during the period awaiting a hearing. If so, however, why should an employer who acted reasonably a year before have to bear the expense of presenting the matter at arbitration or to a human rights tribunal? Surely, this means that specific employers bear disproportionate costs for public policy decisions, and may lead to the counterintuitive finding that duty to accommodate leads to increased reluctance to hire disabled workers.

At the moment, there is no clear trend, but as human rights laws are swiftly making inroads into arbitration, many arbitrators will find justification in the general law of the land for their own accommodation of disabled workers at arbitration. Given the current state of flux, the selection of an arbitrator is of paramount importance in forecasting the admissibility of human rights arguments.

Reinstatement with or without Accommodation?

Future performance, a test that must be met for reinstatement of disabled workers discharged for nonculpable cause, is confounded by duty to accommodate. Without the duty to accommodate, management could make a reasonably strong case that the employee's deficient past

performance could be extrapolated into the future. For example, if the shiftworker is incapable of acceptable performance today, what will be different about the shiftworker in the future? The duty to accommodate changes that question: if the shiftworker is incapable of doing a certain job today, if we modify the job will he be able to do it in the future?

In *Re Lancia-Bravo Foods and UFCW* (1990) involving the premature termination of a disabled employee due to innocent absenteeism, duty to accommodate was imported directly into the collective agreement: "... it seems to me that where a duty to accommodate exists in the statute it must be assumed that the parties would have intended that the words 'off work' in [the collective agreement] mean off work *notwithstanding an attempt at reasonable accommodation*" (emphasis added, p. 70). The arbitrator imposed a term into the collective agreement which makes a direct foray into the realm of management prerogative.

In *Marianhill* Mrs Gardner was reinstated by the arbitrator with a specific shift scheduling change. The remedy here was not simply reinstatement, but rather reinstatement into a redefined job. Moreover, no consideration was made in the award of the impact on other members of the workforce and on the broader allocation of shift schedules. Even the more conservative *Calco* award included the statement that "There should be some accommodation in the short term to allow the Grievor to adjust to the return to shift work" (p. 46). By reinstating with accommodation, arbitrators are implicitly making their awards harmonize with the prevailing equity laws, but also are intruding on management rights for scheduling work for non-disabled workers.

There are two emerging issues here. First, arbitrators are beginning to use the duty of reasonable accommodation as a consideration to be applied to *future* performance, not merely a ground for assessing whether management did or did not discriminate or violate the collective agreement in its actions of the past. Second, arbitrators are bringing duty to accommodate into determinations of remedies: there is little point in reinstating a disabled employee to a job that cannot be accomplished with any degree of certainty. When reinstating, arbitrators are having to dictate the terms of reinstatement in a way which reduces barriers to employment for the disabled.

DIABETES AND SHIFTWORK: EXAMINING A CASE OF ADVERSE EFFECT DISCRIMINATION

Among the people likely to have problems with shiftwork are those over 40, and those who have sleep disorders, emotional disorders,

epilepsy or diabetes. According to Joseph LaDou, these factors involve roughly half the American work force. Even employees taking antihistamines are at risk, as there is speculation that "Medication can have different effects depending on when it is taken" (Stones 1987: 4). Much research is available on the effects of shiftwork on the general population. Though a discussion of the shiftwork literature is beyond the scope of this paper, it must suffice to say that these studies generally conclude that there is reason for concern. (See, for example, Jamal 1989, Stones 1987, and Moore-Ede and Richardson, 1985.)

I have elected to focus on diabetic shiftworkers because their problems perfectly illustrate adverse effect discrimination. Diabetes raises especially complex problems for management practices. Diabetes is a 'hidden' disability in the sense that the disease is not normally recognizable to co-workers and employers. The course of the disease is highly individualistic so that it is difficult to make sweeping statements about diabetics as a group. Diabetics have achieved statutory protection from discrimination under the rubric of disabled workers. There is a significant body of case law involving the employment of insulin-dependent (Type I) diabetics, some of which was highlighted in the earlier section.

About 5 percent of the population have diabetes, which means that there are up to 150,000 diabetic shiftworkers in Canada (Williams et al 1984). The Type I diabetic must make constant calculations to match insulin intake with diet and activity level. Regularity of routine is essential to stabilizing diabetes, and insulin therapy is much easier to administer if a consistent daily schedule is maintained. In the past, without the statutory protection, two choices were available to diabetics: either avoid shiftwork altogether, or become hypervigilant in monitoring insulin therapy.

A study widely cited in the diabetes literature conducted by Moore and Buschbom found that 87.5 percent of diabetic shiftworkers perform better or equal to non-diabetics regarding reliability and absenteeism (Kidd et al 1984: 8). Turning this evidence on its head, 12.5 percent of diabetic shiftworkers are performing worse than average. Robinson et al's (1990) survey of employment problems in a random sample of diabetic patients and a group of control subjects aged 17-65 years in the UK confirmed that diabetic shiftworkers were twice as likely as control subjects working shifts to experience problems with their job (18% and 8%, respectively).

Rotating and erratic shiftwork schedules mean that the insulin "manipulations become more complex with increased risks of transient hypo- or hyperglycemia." (Kidd et al 1984: 6). Dr Ross, an expert medical witness in the *CP v. BMW* (Henderson) case, testified as well in *Calco*

(1991) where he described the problems facing shiftworkers in achieving good glucose control:

Insulin has varied time actions with NPH (N) having effective action anywhere between 6 and 24 hours and fast acting insulin (R) acting between 2 to 6 hours. Thus, if someone has a rapid shift change it is not uncommon to have the insulin taken at one time period interfering with the next working period. Thus, diabetics on shift work are urged to allow a reasonable time period between each shift and in most cases the employer will allow a 24 hour to 36 hour time change warning. Alternatively, at least 10 to 12 hours are needed to allow to make the adjustment of insulin action. Also, many employers, understanding the difficulty that the diabetic is experiencing, will try to ensure that the diabetic remains on one shift for a long time period and then allow a reasonable time change between the next shift period.

The disease demands stable shift schedules. Explained Dr Ross, "for many diabetics it is almost impossible to deal with erratic shiftwork... By creating erratic shifts, you are preventing diabetics from doing a type of work."

Three additional factors complicate the scenario. First, any increased stress will lead to fluctuations in blood glucose levels. Unanticipated stressors are especially dangerous to diabetics, since they have not made appropriate adjustments in advance (Cuban 1989; Searle 1981). In *Marianhill* (1990), a fire in the grievor's refrigerator early in the day triggered a severe hypoglycemic response many hours later while she was on duty as a nursing assistant. Second, the fatigue commonly suffered by shiftworkers may be mistaken by the diabetic for a symptom of hypoglycemia (Kidd et al 1984), and treated accordingly, though incorrectly. Third, it is paradoxical that "excessively conscientious" diabetics have an even harder time of shiftwork than less responsible diabetics. Conscientious diabetics try to keep their glucose readings to as low as possible without triggering hypoglycemia. Higher readings over time will contribute to the likelihood of blindness and other serious and irreversible consequences of the disease. Yet in order to have the energy to cope with changes in shiftwork schedules, the readings should be allowed to stray to the higher end of the continuum. Thus, the better a diabetic manages to control his/her illness by keeping blood sugar levels relatively low, the higher the risk of a hypoglycemic reaction following on the heels of an unanticipated stressor (*Marianhill* p. 208; *Calco*).

Both the Canadian and American Diabetes Associations promote the view that diabetics are just as capable as non-diabetics to hold jobs for which they are individually qualified. The greatest barrier to employment is the perception that diabetic employees are a threat to their own or others' safety due to the possibility of hypoglycemic episodes, which impair physical reactions, judgement, and may cause a loss of consciousness. Actually, medical evidence is very sparse and

inconclusive. Corry (1990) argues most diabetics recognize warning signs and take action to avert the onset of hypoglycemia. Further, new practices in the management and treatment of diabetes, such as innovations in glucose monitoring, have led to greater accuracy and better control. Various advocacy groups have made the claim that the enormous self-discipline required of diabetics gives many diabetic employees precisely the positive attributes sought by employers (Hirsh 1990).

The public education work of advocacy groups is a mixed blessing. While it helps reduce misconceptions about the disease, it also creates high expectations about the ability of diabetics to work without accommodation. For example, in the *Calco* arbitration, Mr Van Dalen was advised by his immediate supervisor that "I will not accept your diabetes as an excuse [for tardiness] if you persist in using it as an excuse." The grievor's personnel officer disregarded information that Van Dalen's extreme difficulty in waking - even two alarm clocks and a wake-up call occasionally failed to rouse him - might be attributable to diabetes, because "members of my family also have diabetes and they don't have any problems."

If a diabetic employee believes that the disease is affecting the job, or vice versa, a request must be made to management for a change in the specific terms and conditions of employment. Reasonable accommodation of diabetic employees on shiftwork schedules might be: longer shift rotation cycles, assignment to a fixed shift, shift-splitting with another employee, avoiding short-changing time off between shifts, and allowance of short breaks for snacks, glucose testing, or the administration of an insulin injection. In January 1991 I asked the Job Accommodation Network to search their input file for situations in which shiftwork was addressed for diabetic employees. Four cases were found: a maintenance technician, a security officer, a service clerk, and an employee working in a chemical facility. In each case the employee was removed from shift rotation and placed on a fixed work schedule.

It is appropriate to relate the plight of diabetic shiftworkers back to the four issues which were presented earlier in this paper. On the first issue, actuarial risk or individual assessment, it is clear that diabetics are not to be treated as a class of workers. If a specific diabetic has problems on the job related to his/her disability, the employer must review the evidence presented by the employee and cannot refuse accommodation by referring to the "norms" of the disease. If, for the sake of argument, "Mary" is a diabetic and has no problem working erratic shifts, this information is of no relevance whatever in determining the needs of "John" who appears to be experiencing diabetes-related problems.

Because diabetes often is a hidden disability, it is difficult for the employer to be proactive in offering accommodation. The "shifting onus" stream of cases already supports the notion that diabetics must be responsible for informing their employers of disease-related problems, and requesting accommodation. Once that request is made, however, the onus moves back to the employer who cannot plead ignorance of the employee's condition. As a practical matter so that co-workers can help them in the event of a hypoglycemic episode, and as a legal matter so that their employment rights are protected, diabetics must discharge the onus to inform employers before expecting any accommodation.

On the third issue, whether human rights are imported into arbitration, it is essential for a diabetic employed in a unionized setting to consult the specific collective agreement governing the workplace. Increasing numbers of collective agreements include provisions that incorporate human rights legislation into union-management relations. Such clauses not only indicate the rising consciousness about human rights, but also have the effect of offering guidance to arbitrators who are loath to import human rights principles into arbitrations without prior direction from the collective agreement. If the collective agreement contains provisions which allow human rights to override any specific clauses of the collective agreement, the diabetic is guaranteed some basic human rights provisions during a grievance arbitration. If, however, the collective agreement is silent on human rights, the diabetic is dealing with a bit of a crapshoot. In this situation, the union is well advised to carefully examine prospective arbitrators for their previous decisions regarding the admissibility of human rights principles into arbitration. Many arbitrators are reluctant to address issues that arise outside the jurisdiction explicitly assigned to them by the collective bargaining regime's statutes.

Challenges to conventional shiftwork approaches call for greater flexibility on the part of *both* management and unions. In *Gohm v. Domtar* (1990), the employer and the union were held jointly liable for \$74,000 in damages for failing to accommodate the needs of a Seventh Day Adventist by rescheduling her shift from a Saturday to a Sunday. Management would have allowed Ms Gohm to work on Sunday, but the union insisted that it would invoke the collective agreement clause stipulating overtime pay for Sundays. No compromise was reached, and Ms Gohm was fired. The Human Rights Inquiry decision in this case is warning that neither management nor the union can be an impediment to accommodation, and that undue rigidity by either party to the agreement makes both parties vulnerable at human rights tribunals.

The final issue, involving discipline and discharge of employees, is relevant to diabetic shiftworkers who have had disability-related problems

and therefore failed to satisfy job performance requirements. The central and most perplexing test is that of culpability. To what extent can a disabled employee be held accountable for the shortfalls in performance that arise from nonculpable causes? Clearly, a diabetic is responsible for understanding the limitations posed by the illness. It would be irresponsible for a diabetic with an acknowledged unstable condition to take on work which poses a danger to themselves or to co-workers. Similarly, a diabetic who fails to adhere to dietary restrictions, or is remiss in self-treatment or monitoring blood sugar levels, is culpable for endangering job performance. But often the disease is unpredictable, and even the best efforts of the most conscientious diabetics cannot forestall a deterioration in physical health. Diabetic shiftworkers are encouraged by medical professionals to request a change from erratic to stable shifts. This recommendation for change must be brought to the attention of management, as a simple change in scheduling of work can prevent a traumatic and costly grievance down the road. If management is willing to comply, the union cannot pose the terms of the collective agreement as obstacles to accommodation. The review of cases presented earlier in this paper demonstrates that while arbitrators are likely to impose a change in the terms and conditions of work as a necessity for reinstatement of a wrongfully discharged diabetic, the burden does not rest entirely with management or the union. Often, the diabetic's behaviour on and off the work site is subjected to searching scrutiny. Disabled workers must be advised that arbitral remedies are tempered by the degree to which culpability is a factor in the grievance.

CONCLUSIONS

Human rights issues, and particularly the duty to accommodate, are quite fluid. Generally speaking, however, recent legal decisions are moving in the direction of more stringent tests favouring disabled employees: preference for information about the individual over a group, measuring specific risk over hypothetical risk, favouring accommodation prior to the establishment of bona fide occupational qualifications. A practice that would have been sanctioned by the courts even two years ago - for example, requiring a Sikh employee to wear a hardhat in *Binder* - is no longer legitimate. It is imperative for those actors who set employment practices, whether they be management, union or government, to closely monitor human rights developments.

Greater flexibility in employment policies and practices is urgently needed in order to meet the needs of disabled and other employees. Aside from writing human rights provisions into collective agreements, there is little chance that a collective agreement or employee manual can

anticipate the myriad possibilities that could arise as impediments to the integration of designated classes of employees. Implementation of the principles underlying human rights legislation is an ideal issue to be tackled by joint labour-management committees. While some requests for accommodation might call for considerable disruption to current arrangements and modifications a number of clauses in the collective agreement, the unpredictability of these requests makes accommodation an unlikely bargaining issue. A more timely and responsive labour-management forum is needed. In the area of shiftwork scheduling, for example, lack of flexibility on the part of management or union would prove to be a tangible barrier to employment, not only for diabetics, but for parents of young children, students, and other individuals who might have special needs. (See, for example, the plea for flexibility from the working mother of a young child in *Re Toronto Star Newspapers Ltd. and Southern Ontario Newspaper Guild*, 1990).

What should disabled workers do? Without a doubt, they increase their odds of justifying accommodation if they present a convincing position to management. Had they heeded this advice, Henderson could have won two years of back pay rather than one, Belliveau would have deflected a charge of negligence in failing to rebut management's assertions, and Van Dalen would have mitigated his period of suspension. Because of the current uncertainties about the degree to which arbitrators will delve into human rights, disabled employees would also be well advised to seek excellent medical counsel and pay attention to their self-treatment on the worksite, off the worksite, and even post discharge. While case after case claims that the onus is on management to support its decision to terminate or discipline, as a practical matter the onus often shifts to the employee.

Despite the evolving nature of human rights and a number of unresolved matters, it would be accurate to conclude that the most recent jurisprudence on duty of reasonable accommodation adds enormous weight to a simple request by a diabetic employee for a shift scheduling change.

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L'obligation d'accommoder les employés handicapés

Certaines pratiques managériales, même celles qui sont imposées sans préjudice à l'ensemble des employés, peuvent avoir un effet particulier sur la santé et le rendement de quelques employés handicapés. De récentes décisions judiciaires et arbitrales touchant la discrimination pourraient entraîner une limitation des droits de la direction.

Cet article est divisé en deux sections. D'abord, un ensemble de questions juridiques particulièrement épineuses sont décrites en autant qu'elles touchent les travailleurs handicapés. La seconde section fait l'application de ces problèmes à l'expérience spécifique des travailleurs diabétiques qui travaillent sur des quarts. Cette application pratique permet de fournir un exemple de discrimination et de démontrer l'impact des décisions en matière de droits de la personne.

L'obligation de l'employeur d'accommoder les employés handicapés aura un impact majeur sur les pratiques de gestion. Autant les employeurs que les syndicats auront avantage à prendre la direction suggérée par la Cour suprême du Canada dans sa décision importante dans l'affaire *Central Alberta Dairy Pool*

(1990). Afin de présenter une défense de bonne foi sur les qualifications occupationnelles, à l'encontre d'une accusation de discrimination, l'employeur doit d'abord satisfaire à l'obligation d'accommoder. La décision *Binder* a ainsi été renversée.

Afin de montrer les complexités pratiques et légales qu'impliquent les cas touchant les handicapés, quatre problèmes ont été retenus: d'abord, comment les arbitres ont-ils fait la différence entre le handicap d'un employé donné et les caractéristiques communes de cette maladie? On tend à s'éloigner de l'évaluation basée sur les caractéristiques communes. L'employeur doit présenter sa preuve en regard de la performance spécifique d'un employé handicapé donné et ne peut pas refuser de l'accommoder en se référant aux normes communes applicables à la maladie dont celui-ci est affligé.

En second lieu, qui a le fardeau de prouver qu'un handicapé peut ou ne peut pas nuire au rendement? D'abord, l'employé est responsable d'informer son employeur des problèmes qu'il connaît suite à une maladie et il doit également demander une accommodation. Sans aucun doute, les employés handicapés accroissent leur probabilité de justifier l'accommodation s'ils présentent une position convaincante à l'employeur. Après que cette demande aura été faite, le fardeau de preuve incombe à l'employeur qui doit accommoder l'employé ou refuser sa demande.

Troisièmement, dans quelle mesure l'application des principes applicables aux droits de la personne dans les arbitrages change-t-elle l'admissibilité d'une preuve montée après le congédiement? Les arbitres semblent divisés sur ce sujet. Il est essentiel ici de consulter la convention collective applicable au milieu de travail en question et d'examiner très étroitement les décisions antérieures de l'arbitre concerné. Plusieurs arbitres sont réticents à s'attaquer à des problèmes qui sont en dehors de la juridiction que la convention collective leur accorde explicitement, alors que d'autres vont jusqu'à récrire cette convention collective pour respecter les lois visant l'équité.

Finalement, comment le concept d'accommodation raisonnable va-t-il être intégré à l'intérieur des sentences arbitrales? Les arbitres commencent à utiliser la notion de devoir d'accommodation raisonnable comme étant un critère à être appliqué au rendement futur et non seulement comme une base pour évaluer si l'employeur s'est trompé ou non dans ses pratiques antérieures. Une revue de la jurisprudence démontre que les arbitres sont de plus en plus enclins à imposer un changement dans les termes et les conditions de travail. Une telle position est formulée comme une condition nécessaire pour la réintégration d'un travailleur handicapé qui a été injustement congédié.

La question des droits de la personne et particulièrement le devoir d'accommoder sont des notions difficiles d'application. De façon générale cependant, l'interprétation juridique favorise l'application de mesures de plus en plus rigoureuses en faveur des employés handicapés: la préférence de l'information sur un individu plutôt que sur le groupe, le fait de mesurer le risque spécifique et non le risque hypothétique, et le devoir d'accommodation avant d'en arriver à une défense de bonne foi sur les qualifications occupationnelles. Il devient alors obligatoire pour tous ces acteurs qui établissent des pratiques

d'emploi, que ce soit l'employeur, le syndicat ou le gouvernement, de suivre de très près les développements en matière de droits de la personne.

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